

II. REPORT

Before the Court is a Motion to Dismiss filed on July 5, 2007 (doc. no. 31) filed only on behalf of those Defendants for which an appearance has been entered.¹ The Motion argues that the Complaint should be dismissed for failure to serve in a timely manner. This case was originally filed by the Plaintiff pro se in October 2006. Herbert Terrell entered his appearance on behalf of the Plaintiff in March 2007. At that time Mr. Terrell requested an extension of time to file an amended complaint. That motion was granted and included an extension to effectuate service. A second motion for extension was then filed, however this motion did not include a request for an extension on service. That motion was granted and the amended complaint was filed on July 1, 2007. Defendants filing the Motion to Dismiss currently before the Court did have notice of this lawsuit, and on July 5, 2007 counsel entered an appearance on their behalf. Plaintiff argues that his omission of the request for an extension for service was unintentional and did not prejudice these defendants. The court did find, and still believes, that there was good cause for counsel to request the extension to file the amended complaint and the amended complaint not only clarifies the issues previously presented pro se, but also eliminates a number of defendants, including John Doe defendants.

Fed.R.Civ.P. Rule 4(m) states that the time limit for service is 120 days after the filing of the complaint. It further provides that the Court **may** dismiss the complaint unless the plaintiff provides good cause for the failure.(emphasis added). *See also Pettrucelli v. Bohringer and Ratzinger*, 46 F. 3d 1298 (3d Cir. 1995). The dismissal of the action for failure to serve is purely within the discretion of the court. While this case is no longer pro se, the Court is willing to grant counsel a bit more

¹Westmoreland County Prison, LT Hostoffer, LT Lowther, CO Rosado, CO Hutchinson, CO John Doe #1, Deputy Warden Stephen J Cmar, Warden John Walton, Commissioner Thomas C. Ceraso, Commissioner Phil Light, and Chairman Tom Bayla.

leeway as the original complaint was filed pro se, and pursuant to the pleadings and a conference with both counsel in chambers, there has been some difficulty in counsel meeting with his client. The Court is of the opinion that good cause for the delay in service has been shown, the failure to request an extension for service in connection with the second request for an extension to amend was inadvertent and finally, no prejudice has been shown on the part of these defendants.

II. CONCLUSION

For the reasons set forth above, it is recommended that the Motion to Dismiss (doc. no. 31) be denied.

IT IS FURTHER ORDERED that Plaintiff is allowed ten (10) days from this date to appeal this report and recommendation to a district judge pursuant to Rule 72.1.3(B) of the Local Rules for Magistrate Judges. Failure to appeal within ten (10) days may constitute waiver of the right to appeal.

A handwritten signature in black ink, appearing to read 'Lisa P. Lenihan', written over a horizontal line.

Lisa Pupo Lenihan
United States Magistrate Judge

cc: Counsel of Record